November 2, 2000

Mr. Eric Magee
Staff Attorney
Texas Department of Insurance
Legal and Compliance, Mail Code MC 110-1A
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OR2000-4281

Dear Mr. Magee:

Ms. Sara Shiplet Waitt, Senior Associate Commissioner, Legal and Compliance Division, has asked whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. The request was assigned ID# 141064.

The Texas Department of Insurance (the "department") received five requests from the same requestor which collectively seek:

> 1. Since 1998, all Workers' Compensation Utilization Review complaints and enforcement actions against Liberty Mutual Insurance Company, I.T.T. Hartford, Texas Workers' Compensation Fund, their agents, or personnel.
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> 2. All Workers' Compensation Utilization Review complaints and enforcement actions against all workers' compensation carriers, their agents, or personnel, that relate to the enforcement of article 21.58A of the Insurance Code.
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> 3. All enforcement actions related to Attorney General Letter Opinion No. 90-008A (1990) and article 21.52, section 3, of the Insurance Code.

The department has submitted for our review the information responsive to item 1, as well as representative samples of the information responsive to item 2.[1] We are advised that the

[1]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499

department has no information responsive to item 3. The department claims that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.110, and 552.111 of the Government Code.[2]

The department has also notified Forte Managed Care ("Forte") and Liberty Mutual Insurance Company ("Liberty") of the requests by letters dated September 18 and 13, 2000 in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to public disclosure in certain circumstances). Forte and Liberty each responded to the notice, and we understand their comments to assert that responsive information they submitted to the department is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the asserted exceptions and the submitted comments and arguments, and we have reviewed the submitted information.

We note at the outset that some of the information is governed by provisions outside the Act. The Medical Practice Act (the "MPA"), found at Subtitle B of Title 3 of the Occupations Code, governs records of the treatment of a patient by a physician. Section 159.002(b) states:

> A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Section 159.002(b) makes confidential the responsive physician treatment records. Sections 159.003 and 159.004 provide exceptions to this confidentiality provision, none of which

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(1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[2]The department initially also asserted section 552.107 of the Government Code but subsequently withdrew that assertion. The department acknowledges that the section 552.110 assertion was not timely made under Gov't Code § 552.301. We also note that, with reference to some of the submitted information for which sections 552.101 and 552.110 are asserted, the information was not timely provided to this office, as required by Gov't Code § 552.301(e)(1)(D). The department acknowledges that a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is subject to required public disclosure, which presumption can be overcome only by a compelling reason to withhold the information. Gov't Code § 552.302. The department asserts, and we agree, that information made confidential by law or that affects third party interests may provide a compelling reason to overcome the section 552.302 presumption of openness. Open Records Decision Nos. 552 (1990), 150 (1977), 71 (1975), 26 (1974). We therefore address the section 552.101 and 552.110 assertions.

appear to apply in this instance. Thus, the department must withhold in their entirety the records we have marked pursuant to the MPA.

Subtitle C of Title 3 of the Occupations Code governs records of the treatment of a patient by other professions. Section 201.402(b) states:

> Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

Section 201.402(b) makes confidential the responsive chiropractor treatment records. Sections 201.403 and 201.404 provide exceptions to this confidentiality provision, none of which appear to apply in this instance. The department marked some of the records at issue only for the redaction of patient identifying information. Please note that we believe the chiropractor treatment records, which we have marked, must be withheld in their entirety pursuant to section 201.402(b) of the Occupations Code.

The department asserts section 552.103 of the Act with regard to a portion of the responsive information. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. *See* Gov't Code § 552.103. To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). The department has provided a letter and affidavit in support of the applicability of section 552.103. Based on the information and representations contained therein, we conclude that litigation is reasonably anticipated in this instance. Open Records Decision No. 588 at 7 (1991) (contested administrative proceedings conducted under the Administrative Procedure Act, Government Code, Chapter 2001, constitute litigation for purposes of statutory predecessor to section 552.103). We additionally find the information at issue relates to the reasonably anticipated litigation for the purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. We note, however, that if any opposing party in the anticipated litigation has seen or had access to the information at issue, there is no section 552.103(a) interest in withholding such information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982) (where a party to the litigation has obtained the information at issue, the purpose underlying the statutory predecessor to section 552.103 has been fully served and the exception is no longer

applicable). We have no indication that the information at issue has been made available to the opposing party in the anticipated litigation. We therefore conclude that the information is excepted by section 552.103. Please note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).[3]

Section 552.101 of the Act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The department asserts the applicability of section 552.101 in conjunction with specific provisions of the Insurance and Labor Codes. With reference to their information, Liberty adopts by reference the department's arguments in this regard.

The department claims that section 552.101, in conjunction with Section 4(i) of article 21.58A of the Insurance Code, requires the department to withhold certain utilization review screening criteria and procedures. Section 4(i) of article 21.58A states:

> Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers. Utilization review decisions shall be made in accordance with currently accepted medical or health care practices, taking into account special circumstances of each case that may require deviation from the norm stated in the screening criteria. Screening criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis. Screening criteria must be used to determine only whether to approve the requested treatment. Denials must be referred to an appropriate physician, dentist, or other health care provider to determine medical necessity. *Such written screening criteria and review procedures* shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, *provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.*

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[3]The information may be confidential and thus nevertheless not subject to release upon conclusion of the litigation. Gov't Code §§ 552.101, .352. The department should therefore again seek our decision if this information is requested after conclusion of the litigation.

Ins. Code art. 21.58A § 4(i) (emphasis added). Based on the department's representations and our review of the information, we agree that the documents at issue (excerpts from Forte's utilization review plan) are made confidential under section 4(i) of article 21.58A. Accordingly, the department must withhold this information, which we have marked, pursuant to section 552.101 of the Act.

Section 402.083(a) of the Labor Code, pertaining to records of the Texas Workers' Compensation Commission (the "commission"), states:

> (a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle.

This provision makes confidential information in the commission's claim files. *See* Open Records Decision No. 619 (1993). Section 402.086(a) of the Labor Code essentially transfers this confidentiality to information other parties obtain from the commission's files. Section 402.086(a) states:

> (a) Information relating to a claim that is confidential under this subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal.

In Open Records Decision No. 533 (1989), this office determined that the predecessor provision to sections 402.083 and 402.086 protected information received from the Industrial Accident Board (now the commission), but did not protect information regarding workers compensation claims that the governmental body did not receive from the commission. We are unable to ascertain in this instance which of the submitted records were provided to the department by the commission, as distinct from those records provided to the department by the complainant, claimant/patient, or insurer. We therefore conclude that, to the extent the submitted records were provided to the department by the commission, the department must withhold such records in their entirety pursuant to sections 402.083 and 402.086 of the Labor Code. However, to the extent the responsive records were not obtained by the department from the commission, the above provisions do not except such records from required public disclosure. Therefore, the submitted documents that were not provided to the department by the commission are not excepted from disclosure by section 552.101 of the Act in conjunctions with sections 402.083 and 402.086 of the Labor Code.

As it appears that at least some of the submitted documents containing worker's compensation claim information were not provided to the department by the commission, we next address the department's and Liberty's assertions that claimant identifying information must be redacted from these documents pursuant to article 5.58(d) of the

Insurance Code. We first note that subsection (c) of the article requires that claim reports containing specified categories of information be submitted to the department "on each workers compensation claim." *See* Ins. Code art. 5.58(c). Subsection (d) of the article states:

> Information Confidential. A person may not distribute or otherwise disclose a social security number or any other information collected under Subsection (c) of this article which would disclose the identity of any claimant.

By its express terms, the above confidentiality provision applies only to claimant identifying information in the reports that are required to be submitted to the department pursuant to article 5.58(c). The submitted information was evidently provided to the department in connection with complaints made to the department. We have no indication that any of the information was submitted to the department pursuant to article 5.58(c). Accordingly, we conclude the claimant identifying information in the submitted documents is not excepted from disclosure by section 552.101 of the Act in conjunction with article 5.58(d) of the Insurance Code.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. The department asserts that certain "personal financial information," which the department has marked, implicates an individual's common law right to privacy and must be withheld on that basis. We also understand Liberty's comments to assert that the disclosure of any of their claimant/patient identifying information that is not otherwise confidential as provided above implicates the patient's right to privacy and must be withheld. We next address these assertions.

Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The

scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

The court in *Industrial Foundation* specifically addressed information in worker's compensation claim files, and the court concluded that, in and of itself, information revealing the name and social security number of the claimant, the employer, and the alleged injury does not implicate an individual's common law or constitutional right to privacy. 540 S.W.2d at 681, 686. We thus do not agree with Liberty's assertion that all patient/claimant identifying information that is not otherwise confidential as provided above must be redacted as implicating an individual's right to privacy. We also believe that a legitimate public interest exists in some of the information, specifically public court records, that the department seeks to withhold under the common law right to privacy. *See also* Gov't Code § 552.022(a)(17) (information that is also contained in a public court record not excepted from disclosure unless expressly confidential under other law). We have marked the specific information in the submitted documents that we believe is excepted from disclosure by section 552.101 of the Act in conjunction with the doctrines of common law and/or constitutional privacy. The remaining information, except as otherwise provided above, is not excepted from disclosure by section 552.101 of the Act.

Finally, we address the section 552.110 assertion. Section 552.110 of the Act states:

> (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
>
> (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from [required public disclosure.]

As to section 552.110(a), we note that a "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). This office has stated that information is excepted from disclosure under section 552.110(a) where a *prima facie* showing is made to this office that the information constitutes a trade secret. Open Records Decision No. 552 (1990). Liberty states that the complaints involving Liberty "and related enforcement documents should not be disclosed because they contain trade secrets . . .." There are six factors this office considers in determining whether a prima facie case has been made that information constitutes a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). Liberty makes no arguments with reference to these factors. Upon careful consideration of the submitted comments, we do not believe Liberty has made a *prima facie* case that any of the their information constitutes trade secret information.

As to section 552.110(b), the provision states the standard to be applied and, as quoted above, the language of subsection (b) requires the third party whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that disclosure of its information would likely result in substantial competitive injury to the third party. *See also* Open Records Decision No. 661 at 5-6 (1999). Upon careful consideration of the arguments, we believe that Liberty has shown the applicability of section 552.110(b) to its procedures regarding quality assurance, except for the position descriptions contained therein, which are evidently made available to the public. We also believe that Forte has demonstrated the applicability of section 552.110(b) to its document marked exhibit 1 (which apparently was attached to a June 5 piece of correspondence). We have marked the documents the department must withhold pursuant to section 552.110. We do not believe that section 552.110 has been demonstrated to apply to any of the remaining submitted information.[4]

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[4]Forte makes specific arguments regarding information which Forte states is contained in pieces of correspondence dated May 4, June 5, and September 6, 2000. However, the department did not submit these

In summary, and for your convenience, we have marked with blue flags the documents the department must withhold in their entirety under the MPA, section 201.402(b) of the Occupations Code, section 552.101 of the Act in conjunction with article 21.58A § 4(i) of the Insurance Code, section 552.103 of the Act, and section 552.110 of the Act. We have also marked with green flags the documents that contain information implicating an individual's right to privacy. The department must redact from these documents the marked information, pursuant to section 552.101 of the Act in conjunction with the doctrines of common law and constitutional privacy. In addition, pursuant to section 552.101 of the Act in conjunction with sections 402.083 and 402.086 of the Labor Code, the department must also withhold in their entirety any of the submitted documents that were provided to the department by the commission. The department must release to the requestor the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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documents for our review. As these documents were not submitted for our review, we do not address Forte's assertions regarding the information at issue in the May 4, June 5, and September 6 pieces of correspondence.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 141064

Encl. Submitted documents

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